

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant:	Giannini <i>et al.</i>	Examiner:	Karmis, Stefanos
Serial No.:	09/531,102	Group Art Unit:	3693
Filed:	March 17, 2000	Docket No.:	JARB.004PA
Title:	Merged Images Viewed Via a Color-Code Scheme		

REPLY BRIEF

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Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Customer No. 40581

Dear Sir:

This Reply Brief is submitted pursuant to 37 C.F.R. § 41.41(a)(1) for the above-referenced patent application. On December 5, 2008 the Examiner provided a Supplemental Examiner's Answer to Appellant's Appeal Brief submitted on November 8, 2006, in support of the Notice of Appeal filed on September 14, 2006 and in response to the final rejections of Claims 17-31 as set forth in the Final Office Action dated June 23, 2006.

No fee should be required for the timely filing of this Reply Brief. However, if deemed necessary, authorization is given to charge/credit Deposit Account number 50-0996 (JARB.004PA) all required SMALL-ENTITY fees/overages.

I. Real Party In Interest

The real party in interest is the Assignee, Jarbridge, Inc.

II. Related Appeals and Interferences

Appellant is unaware of any related appeals or interferences.

III. Status of Claims

Claims 1-16 stand canceled; claims 17-31 stand rejected and are presented for appeal; the pending claims under appeal are listed in the attached Claims Appendix.

IV. Status of Amendments

No amendments have been filed subsequent to the Final Office Action dated June 23, 2006.

V. Summary of Claimed Subject Matter

Commensurate with independent claim 17, the present invention is directed to a system and method for on-line viewing of multiple apparel articles (*e.g.*, blouse and slacks) that bear true colors which cannot be accurately discerned via on-line (*e.g.*, computer monitor) viewing. One aspect of the present invention is generally directed to viewing at least two articles on-line and matching the articles by color using a color-identification standard. An example implementation of this aspect of the present invention involves on-line viewing of a first and second article through linking nodes. A coded color matching approach uses respective color codes that are provided with the articles to the computer device to permit the computer device to determine whether the respective color codes (associated with the articles) satisfy a matching criterion. An advantage of such an implementation is that a user is able to have the computer device differentiate among varying shades of a similar color (*e.g.*, multiple shades of blue) that would otherwise appear the same on a computer display; for example, the computer device determines automatically and accurately whether a particular shade of blue matches or clashes with another item of an apparently similar shade of blue.

One embodiment of the present invention is directed to a system for comparison of multiple apparel articles. *See, e.g.*, page 5, lines 17-25 and in Figure 1, the sellers 114. The system includes an on-line viewer site 112 and a computer-driven web-linking engine 101. The computer-driven web-linking engine is configured and arranged to display a first colored apparel article selected by an on-line viewer from the on-line viewer site for display with a second colored apparel article that is also selected by an on-line viewer from the on-line viewer site 102 and/or 103. The computer-driven web-linking engine is adapted to use a color matching criterion to determine whether the first colored apparel article color matches the second colored apparel article color. *See, e.g.*, page 6, lines 8-15.

As required by 37 C.F.R. § 41.37(c)(1)(v), a concise explanation of the subject matter defined in the independent claims involved in the appeal is provided herein. Appellant notes that representative subject matter is identified for these claims; however, the abundance of supporting subject matter in the application prohibits identifying all textual and diagrammatic references to each claimed recitation. Appellant thus submits that other application subject matter, which supports the claims but is not specifically identified above, may be found elsewhere in the application. Appellant further notes that this summary does not provide an exhaustive or exclusive view of the present subject matter, and Appellant refers to the appended claims and their legal equivalents for a complete statement of the invention

VI. (New) Grounds of Rejection to be Reviewed Upon Appeal

1. Claims 25-26 stand rejected under 35 U.S.C. § 112(2) as being indefinite.
2. Claims 17, 19-22 and 30-31 stand rejected under 35 U.S.C. § 103(a) over Arnold *et al.* (U.S. Patent No. 6,016,504) in view of Dial (U.S. Patent No. 5,537,211).
3. Claim 18 stands rejected under 35 U.S.C. § 103(a) over Arnold *et al.* (U.S. Patent No. 6,016,504) in view of Dial (U.S. Patent No. 5,537,211), and in further view of Rose (U.S. Patent No. 5,930,769).
4. Claims 23-29 stand rejected under 35 U.S.C. § 103(a) over Arnold (U.S. Patent No. 6,016,504) in view of Dial (U.S. Patent No. 5,537,211), and in further view of Shimizu *et al.* (U.S. Patent No. 6,323,969)

VII. Argument

Appellant submits generally that, in each rejection, the Examiner has relied upon impermissible hindsight reconstruction to improperly combine and interpret various portions of the cited references. For instance, the Examiner has attempted to pluck individual components of the various references and combine them using the Appellant's invention as the primary rationale for the asserted combination. Thus, the Examiner has improperly used the Appellant's invention as a template to selectively implement various components of the cited reference in a manner that is not suggested and without motivation in the references. Such hindsight reconstruction is improper under M.P.E.P. 2141.01 which incorporates the following case law:

"It is difficult but necessary that the decisionmaker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art." *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984).

This improper hindsight reconstruction is further supported by the Examiner's Answer, as discussed hereafter. Appellant notes that in a recent case the Supreme Court

states that the teaching, suggestion and motivation test captures helpful insight. It further states that merely demonstrating that each element was, independently, known in the prior art is not sufficient to show obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 2007 U.S. LEXIS 4745 (U.S. 2007). The Examiner has attempted to address novel aspects of Appellant's claimed limitations by creating elements not present in either reference. Moreover, the Examiner has not addressed novel elements of Appellant's claimed invention, seemingly overlooking corresponding claimed limitations.

In the field of web-based services convenience is of utmost importance. Users are afforded access to web services of competitors through a simple click of a mouse. Thus, any aspect of the service that increases the convenience for the user can lead to substantial increases in participation. Appellant realized that a problem exists for users desiring to purchase apparel online. In particular, the user of a website encounters significant problems in coordinating multiple pieces of apparel. Examples of such problems include, but are not necessarily limited to, not being able to view the apparel simultaneously, color discrepancies due to monitor settings and color discrepancies due to differences in image capture (*e.g.*, lighting or image capture device/settings). To alleviate such problems, Appellant's claimed invention is directed to a web-driven engine that provides for simultaneous display of apparel. In addition, the web-driven engine determines the compatibility of the colors of the apparel using a color matching criterion. Thus, this specialized web-driven engine performs many tasks on behalf the user and can be useful for creating more efficient and pleasing experience.

Nothing in the record corresponds to this unique combination of elements and functionality. In an attempt to show correspondence to the claimed invention, the Examiner resorts to plucking various elements from different teachings. In doing so, however, the Examiner ignores the context in which these elements are taught. In particular, the Examiner is taking elements from a hand-held scanning device and a protocol translator for printers and applying them to web-driven engines in a manner not contemplated nor suggested by the references. Indeed, if the skilled artisan were to implement the elements in the manner taught by the references, the results are nonsensical. When presented with the illogical results of the asserted combination, the Examiner argues that the features of the secondary

reference do not have to be bodily incorporated into the structure of the primary reference (see Supplemental Examiner's Answer at pages 8-9). As such, the Examiner ostensibly agrees that the teachings of the references are incompatible. It would therefore appear that the Examiner's opinion is that the skilled artisan would ignore the context of the references and overlook their incompatibilities. Beyond that, the Examiner believes that the skilled artisan would seek to implement a web-driven engine in a manner not taught by either reference nor explained by any teachings other than Appellant's own specification. The Supreme Court in *KSR* explained that most, if not all, inventions are made up of what was in some sense already known.

A. The Section 103(A) Rejection Of Claims 17-31 Is Improper Because The Examiner Fails To Present Prior Art That Teaches The Claimed Invention As A Whole: The Asserted References Teach Away From The Asserted Combination; And There Is No Evidence In The Record Of The Requisite Motivation.

The Arnold reference fails to teach color matching a first colored apparel article to a second colored apparel article. The Examiner's Answer presents a new argument by asserting that the Arnold reference, on its own, teaches color matching of different items. While Appellant believes that this constitutes a new ground for rejection, Appellant does not seek to reopen prosecution because the argument has little merit. The Examiner merely points out that the Arnold reference lists the colors of the items, along with other data, and states that it is possible that a user could make a comparison. The Examiner's hypothetical comparison purportedly taught by the Arnold reference is explained as being carried out by a user. The claimed invention is directed to a computer-driven web-linking engine adapted to determine whether or not two colors match. Appellant submits that the Examiner is erroneously equating a person or user to a computer-drive web-linking engine. Moreover, the Examiner has not provided any support for a user performing such a comparison in the teachings of the Arnold reference. Instead, the Examiner's only support for such a comparison step is to impermissibly use hindsight reconstruction based upon the Appellant's invention. Accordingly, pursuant to M.P.E.P. 2131.02, the asserted correspondence is

improper because the Examiner has failed to show that the Arnold reference teaches each element of the claimed invention.

The Examiner also attempts to address this deficiency using the teachings of the Dial reference. The rejections are improper because the Examiner does not view the references as a whole, choosing instead to use impermissible hindsight reconstruction from the Appellant's invention, to selectively implement components of the references and attempt to combine those components. For instance, the references, when viewed as a whole, teach away from the Examiner's asserted combination. The M.P.E.P. and the applicable U.S. Supreme Court law requires that the claim be considered "as a whole" (35 U.S.C. §103(a)), while taking into consideration the problem(s) being addressed by the claimed invention and any unexpected results. Thus, the U.S. Supreme Court in *KSR* reaffirmed the familiar framework for determining obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), and stated that, "when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be non-obvious." The Court further tied in the relationship between the teach-away standard and demonstrating unpredictable results. "The fact that the elements [in *Adams*] worked together in an unexpected and fruitful manner supported the conclusion that Adam's design was not obvious to those skilled in the art." *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1742 (2007).

The primary Arnold reference is directed to a web-based "virtual outlet" for shopping on the internet to allow for remote purchasing of goods by a customer, and as such, teaches away from having physical access to any of the apparel items. *See, e.g.*, Abstract, Fig. 1A, and col. 5, line 41 to col. 6, line 34. Whereas, the color matching taught by Dial, as cited by the Examiner, requires physical access to the items in order to provide a color measurement using a photosensor head. *See, e.g.*, col. 6, lines 24-34. More specifically, a light source illuminates the item for comparison and a photosensor provides an indication of the color of the object. *See, e.g.*, Col. 4, lines 45-54. A specific object of the Dial reference is to provide a point of sale device for accomplishing such a color determination. *See, e.g.*, col. 1, lines 56-59 and col. 3, lines 25-44. Moreover, the asserted combination would not function properly because the Arnold reference is directed to Web pages that customers can link

through to a merchant's page. *See, e.g.,* Arnold, Abstract. Thus, the invention of the Arnold reference teaches a web interface that is a level removed from even the merchant's page. As such, the system taught by the Arnold reference would not provide direct access to the goods being sold as required by the teachings of the Dial reference. Accordingly, a stated object of the Dial reference and the supporting teachings of the Dial and Arnold references each teach away from the Examiner's asserted combination of references.

The Examiner fails to address these substantial and fundamental differences between the references. Instead, the Examiner ignores these fundamental differences and attempts to combine select portions of the references in a way that is unsupported by the references. As such, the Examiner has not considered the teachings of the references as a whole. Moreover, the asserted combination does not suggest how the teachings of the two references could be combined. For instance, when viewing Arnold one skilled in the art would not be lead by Dial to add virtual color matching to Arnold because in every embodiment Dial teaches that one must have physical access to the articles to perform color matching. The Examiner has failed to address how this proposed combination would operate without the physical access to the article. Instead, the Examiner's Answer merely points out that the Dial reference mentions control logic. Appellant maintains that Dial's handheld device and control logic is fundamentally different from a computer-driven web-linking engine in terms of technology, function and field-of-use.

The Examiner's Answer provides further evidence of improper hindsight reconstruction. For instance, the Examiner is asserting that the motivation to combine would be to allow a potential purchaser to obtain a level of product information that would assist determining whether or not to purchase the products. Appellant is at a loss as to how one skilled in the art would be led by the references to create a computer-drive web-linking engine arranged to determine color matches. The Arnold reference, as relied upon by the Examiner, already provides product information that would assist a purchaser including listed colors. With regard to the Dial reference, the Examiner's assertion of motivation relies upon a portion of the Dial reference (Col. 6, lines 49-61) that does not teach a motivation for implementing color matching using a web-linking engine. More specifically, the cited portion of the Dial reference merely teaches that color matching can be accomplished by matching

articles that have the smallest difference between colors. *See, e.g.*, col. 6, lines 49-61. Accordingly, the Examiner's alleged motivation is not present in the references, when viewed as a whole, and instead, appears to be the result of the Examiner improperly reconstructing the teachings of the cited references in view of Appellant's invention.

In a more specific example, the Examiner fails to show how any portion of either reference suggests implementing color matching using a web-linking engine. For the reasons discussed herein, the color matching taught by the Dial reference is only possible when one has physical access to the colored articles that one wishes to compare. Accordingly, the Examiner has provided no motivation of how or why one skilled in the art would be led by Dial to add virtual color matching to Arnold. It is important to provide a clearly articulated explanation as to why the elements are to be combined. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1742 (2007). In this instance, the Examiner has taken vague concepts from various fields of endeavor and concluded that the skilled artisan would implement them in the precise manner taught by Appellant's Specification. In doing so, the Examiner has improperly concluded, without direct support, that key elements of Appellant's invention are obvious.

Moreover, the proposed modification is improper because it would frustrate the purpose of Arnold. As is consistent with relevant case law and the M.P.E.P., there is no motivation to modify a reference where the modification would undermine or defeat the purpose of the reference. *See, e.g., In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). The Arnold reference is directed to a web-based "virtual outlet" and as such does not have physical access to any of the apparel items. The color matching taught by Dial requires physical access to the items in order to measure them with a photosensor means. *See, e.g.*, col. 6, lines 24-34. The Examiner's Answer appears to assert that because the Dial reference mentions control logic there would no longer be a requirement that the device have physical access. This control logic, however, is only designed to be used in cases where there is physical access. There would be no motivation to combine the color matching of Dial with the "virtual outlet" taught by Arnold, because the combination would defeat the purpose of Dial in that it would no longer be a virtual outlet. *See* M.P.E.P. § 2143.01

For the reasons discussed herein, the Section 103(a) rejection of claims 17-31 is improper and should be withdrawn.

B. The Section 112, Second Paragraph, Rejection Of Claims 25 And 26 Is Improper Because The Claims Are Discernable To One Skill In The Art.

The Examiner's Answer highlights a fundamental flaw in the Examiner's logic. More specifically, the Examiner has once again erroneously construed the limitations of the claim to be nothing more than the display of data. As discussed above, the claimed invention is directed to a computer-driven web-linking engine adapted to determine whether two colors match. This is different from the mere display of two colors because it requires an objective standard implemented by a computer-driven web-linking engine and not merely a subjective standard applied by a user. In the specific examples of claims 25 and 26, color codes are compared using the computer-driven web-linking engine using an objective standard. Appellant notes that individual (human) decision making is required for something to be considered subjective, and as such, the Examiner's assertion is illogical in view of the above discussion, which highlights the use of a computer implementing (as further explained below) an objective standard. There is no valid reading of the claims that would cover the Examiner's hypothetical situation of a person subjectively determining the color compatibility.

Section 112, second paragraph, rejection is improper because the claimed limitations are readily discernable in a manner consistent with the requirements of Section 112(2), and are further supported in the specification. Specifically, as consistent with M.P.E.P. § 2173.02, "[t]he requirement to 'distinctly' claim means that the claim must have a meaning discernible to one of ordinary skill in the art when construed according to correct principles." Further, a claim is indefinite "[o]nly when a claim remains insolubly ambiguous without a discernible meaning after all reasonable attempts at construction." The Section 112(2) rejection of claims 25 and 26 are improper because the indicated claim term "compatible" would be understood by one of ordinary skill in the art, and is supported by examples in the specification. For instance, the specification describes various example embodiments including that an industry-standardization scheme can be used to determine color compatibility, one example includes the Exxel Color Match Guide. *See, e.g.,* page 5, lines 23-28; *see also* M.P.E.P. § 2173.05.

Accordingly, the term “compatible” denotes the use of objective standards to determine color compatibility. The individual personal tastes alleged by the Examiner are merely examples of possible data that can be used in the step of determining. Put another way, an objective process is not rendered subjective because the processed data might be derived from a subjective decision by a person. Determining color compatibility, as taught by Appellant’s Specification, merely describes a process that can be responsive to subjectively generated data, and thus, has a meaning discernable to one of ordinary skill in the art.

In view of the above argument, the Section 112(2) rejections of claims 24-25 are improper and should be withdrawn.

C. The Section 103 Rejection Of Claims 23-29 Is Improper Because The Examiner Fails To Present Prior Art That Teaches The Claimed Invention As A Whole: There Is No Evidence In The Record Of The Requisite Motivation; And The Examiner Does Not Show Correspondence To The Claimed Limitations.

The Examiner relies upon the Shimizu reference to teach the limitations directed to the use of color codes to match apparel items. The Examiner fails to view the teachings of the Shimizu reference as a whole. Instead, the Examiner has improperly ascribing meanings to elements and teachings of the Shimizu reference that are based upon Appellant’s invention rather than the teachings of the Shimizu reference.

More specifically, the Examiner asserts that the Shimizu reference teaches comparing and converting colors as discussed in the claimed invention. The Examiner’s assertion is inconsistent and illogical in view of the teachings of the Shimizu reference when viewed as a whole. Thus, as discussed in more detail below, the Examiner’s rejection is improper because it relies upon the Appellant’s claimed invention to provide the necessary teachings.

The Shimizu reference teaches an apparatus and method that allows dissimilar devices (*e.g.*, scanners, printers, displays and facsimiles) to exchange color images and accurately reproduce colors from the sending device to the receiving device despite different color capabilities of the two devices. *See, e.g.*, Abstract and col. 5, lines 46-52. The Examiner fails to provide any evidence of motivation to combine the cited references. Moreover, Examiner appears to rely upon specific teachings of FIG. 37, FIG. 39 and the relevant discussion of the Background section of the Shimizu reference. Such teachings are

directed to generating a color output signal for the devices, and as such, are unrelated to color matching of apparel items. Accordingly, the cited portions of the references do not teach or suggest any motivation to combine the references in the manner asserted by the Examiner and the Section 103(a) rejection is improper.

Moreover, the Examiner fails to provide an explanation as to how the CMY values shown in FIG. 39 correspond to the claimed limitations. The CMY values of the FIG. 37 and FIG. 39 are taught to be used to convert an "L*a*b*" value into a CMY value. *See, e.g.*, col. 2, lines 35-60 and col. 37, lines 8-10. The Examiner erroneously asserts that a determination as to whether or not the L*a*b* values are in the range involves a color matching. Instead, the Shimizu reference teaches that the ranges correspond to whether or not the color is reproducible by the printer. *See, e.g.*, col. 50, lines 11-18. Thus, the table fails to teach any comparison between color values as suggested by the Examiner and instead represents a conversion between L*a*b* and CMY values.

The Examiner's Answer states that the Shimizu teaches conversions between colors; however, the Examiner's logic has at least two flaws. First, the Examiner mischaracterizes the teachings of the Shimizu reference by claiming that the codes are for converting colors. The Shimizu reference does not teach converting colors to different colors. On the contrary, the Shimizu reference teaches maintaining the color and converting between different codes for different devices. *See, e.g.*, Col. 13, lines 3-11. Such a conversion is not equivalent to a comparison between colors because the represented color remains the same. An analogous and more simplistic version of the type of conversion performed by the Shimizu reference could be described as follows. One code may represent red with the number 2, while a second code represents red with the number 3. The Shimizu reference teaches a method for changing the digital values from 2 to 3. Such a code conversion does not correspond to the Examiner's asserted color conversion because the underlying color remains red. Second, the Examiner fails to address how the Shimizu reference teaches or suggests a comparison between colors. Such unsupported statements appear to be the result of the Examiner improperly interpreting the teaching of the Shimizu reference using hindsight reconstruction based upon Appellant's teachings. Accordingly, the Examiner has failed to provide correspondence for each claimed limitation, and the Section 103(a) rejection is improper.

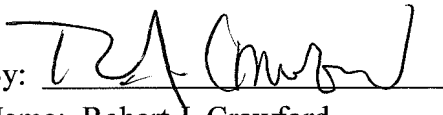
VIII. Conclusion

In view of the above, Appellant submits that the rejections of claims 17-31 are improper. Appellant therefore requests reversal of the rejections as applied to the appealed claims and allowance of the entire application.

Authority to charge the undersigned's deposit account was provided on the first page of this brief.

Respectfully submitted,

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CLAIMS APPENDIX
(S/N 09/531,102)

17. (Previously presented) A system for comparison of multiple apparel articles, comprising:
an on-line viewer site; and
a computer-driven web-linking engine configured and arranged to display a first colored apparel article selected by an on-line viewer from the on-line viewer site for display with a second colored apparel article selected by an on-line viewer from the on-line viewer site, the computer-driven web-linking engine adapted to use a color matching criterion to determine whether the first colored apparel article color matches the second colored apparel article color.
18. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to display an image corresponding to a structure dressed with the first colored apparel item and the second colored apparel item.
19. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item from a first store and the second colored apparel item from a second store.
20. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item and the second colored apparel item from the same store.
21. (Previously presented) The system of claim 17 wherein at least one of the first colored apparel article and the second colored apparel article are provided by a retail store and wherein the computer-driven web-linking engine is configured and arranged to be operated independent from the retail store.

22. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item from a first store and the second colored apparel item from a second store and wherein the computer-driven web-linking engine is configured and arranged to be operated independent from each of the stores.

23. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is further adapted to compare a color code provided for the first colored apparel item with another color code provided for the second colored apparel item.

24. (Previously presented) The system of claim 23 wherein the computer-driven web-linking engine is further adapted to use a color code common to each of the color codes provided for the first and second colored apparel items.

25. (Previously presented) The system of claim 23 wherein the matching criterion includes comparing the color codes and automatically indicating for the on-line viewer whether the comparison determines that the first and second colored apparel items are color compatible.

26. (Previously presented) The system of claim 24 wherein the matching criterion includes comparing the color codes and automatically indicating for the on-line viewer whether the comparison determines that the first and second colored apparel items are color compatible.

27. (Previously presented) The system of claim 23 wherein the first and second colored apparel items include respective electronic tags carrying the color codes.

28. (Previously presented) The system of claim 27 wherein the electronic tags are part of product codes that identify the respective first and second colored apparel items.

29. (Previously presented) The system of claim 23 wherein the first colored apparel item is selected from a virtual closet maintained for the on-line viewer.

30. (Previously presented) The system of claim 17 wherein the color matching criterion includes a color-reference coding chart.

31. (Previously presented) The system of claim 30 wherein the color-reference coding chart is based on measured color frequencies.

APPENDIX OF EVIDENCE

Appellant is unaware of any evidence submitted in this application pursuant to 37 C.F.R. §§ 1.130, 1.131, and 1.132.

APPENDIX OF RELATED PROCEEDINGS

As stated in Section II above, Appellant is unaware of any related appeals, interferences or judicial proceedings.